UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation	File No. 15-MD-2666 (JNE/FLN)
	Minneapolis, Minnesota
	March 12, 2018
	10:37 a.m.
	DIGITAL RECORDING

BEFORE THE HONORABLE FRANKLIN L. NOEL
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTION HEARING)

APPEARANCES

For the Plaintiffs:
MESHBESHER & SPENCE
Genevieve M. Zimmerman, ESQ.
1616 Park Avenue
Minneapolis, MN 55404

For the Defendant:
BLACKWELL BURKE P.A.
Mary S. Young, ESQ.
Benjamin Hulse, ESQ.
Peter J. Goss, ESQ.
431 South Seventh Street
Suite 2500
Minneapolis, MN 55415

Court Reporter:
STACI A. HEICHERT
RDR, CRR, CRC
1005 U.S. Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

Proceedings recorded by mechanical stenography; transcript produced by computer.

P R O C E E D I N G S

IN OPEN COURT

THE COURT: Okay. This is In Re. Bair Hugger Forced Air Warming Device Product Liability Litigation. Let's get everybody's appearance on the record. For the plaintiff.

MS. ZIMMERMAN: Good morning, Your Honor. Genevieve Zimmerman for plaintiffs.

MS. YOUNG: Good morning, Your Honor. Mary Young for defendants.

MR. GOSS: Good morning, Your Honor. Peter Goss for defendants.

THE COURT: Okay. We are here for a hearing on plaintiffs' motion to compel and the defendant's motion for a protective order, correct?

MS. ZIMMERMAN: Yes, Your Honor.

THE COURT: Okay. Let's start with the plaintiffs' motion to compel, Ms. Zimmerman.

MS. ZIMMERMAN: Thank you, Your Honor. May I please the Court. We're here with respect to, as the Court has indicated, plaintiffs' motion to compel additional information necessary for completion of our duties under Pretrial Order No. 24, which is repopulation of the bellwether pool. We have been obligated to provide proof of Bair Hugger use to defendants, and I believe that we

completed that on February 9th. In response, PTO No. 24 required 3M to essentially let us know if there were cases where they were challenging the proof of product claims and then also to produce relevant documents that the defendants may have with respect to those challenges.

And we outlined in our papers some of the issues that we have with respect to defendants many challenges. The defendants have challenged more than half of the 100 cases randomly selected by the Court for potential inclusion in the second bellwether pool.

And I would start by directing Your Honor to the challenge that was made with respect to Carol Griffin, and her case is 17-CV-1520. And so, for example, the challenge made here, plaintiffs have produced records that show the Bair Hugger was used during the surgery. And in connection with their response to the PTO 24, defendants say that they agree that they were selling blankets in the 12 months leading up to the surgery but that there's no records that they have that the warming devices themselves were ever placed at that hospital, and that's at least in the spreadsheet that they provided to us.

And I'm sure we could -- I haven't -- I have two copies of the spreadsheets if the Court would like to look at. We have one that we could e-mail the Court as well. But these are defendant's spreadsheets kind of indicating as

to the 100, here's what we know. Here's if the actual warming unit itself was placed and then also a separate spreadsheet that says we show that we've sold Bair Hugger blankets themselves in the 12 months ahead of time. So they say yeah, we were selling Bair Hugger blankets but we don't see that we ever supplied a warming unit.

To contrast with that, though, plaintiffs looked through some of the documents that have been produced, and in 2010 the FDA requested a customer list from 3M, and we have that information in the documents that were produced to plaintiffs. And at the Bates range BMBH572250, 3M indicated to the FDA that, in fact, they had placed 27 Bair Hugger warming units at the particular hospital in Alabama where Ms. Griffin's surgery took place by the year 2010. Her surgery was in 2015. So what they've told the FDA is not consistent with what they've told the plaintiffs in connection with this bellwether identification process. And that is just one example that I can point the Court to specifically with respect to Bates numbers where we see what they're telling us now is inconsistent with what they've told the FDA in the past.

Some of the other challenges that we see, Dale Anderson, for example, he's case 17-CV-1928, the anesthesia record clearly actually preprints Bair Hugger on the medical record itself but they've misspelled Bair Hugger, it's

B-A-E-R, on the medical record, and the challenge is essentially there's unspecific Bair Hugger confirmation. So not that there isn't a check mark but it doesn't say Bair Hugger, but from what we can see, it was misspelled.

THE COURT: But as I understand it, part of the defendant's objections here are that the plaintiff is supposed to do more than look to see that there's a check mark that says Bair Hugger was used, that you're supposed to have some evidence before they even have to go back and produce evidence to show that the Bair Hugger was or wasn't used in the particular case, and they're saying that you've not done that, you've just come up with another check the box thing.

MS. ZIMMERMAN: Well, respectfully, Your Honor, I think that, from the plaintiffs' perspective, in vetting a case prior to filing it for Rule 11 purposes, once a plaintiff -- or the plaintiffs' attorney sees on the medical record that a Bair Hugger box is checked, between that medical record confirmation and also what we know about the merit -- the Bair Hugger market share , we certainly think that there has been a due diligence that supports that Bair Hugger was used in the particular surgery.

So, for example, if Mr. Anderson were my client and I saw Bair Hugger checked on his anesthesia record B-A-E-R, I would think that was a Bair Hugger use. The fact

that it was misspelled on the anesthesia record would not suggest to me that I needed, for example, an affidavit from the anesthesiologist that performed the surgery that day. I think that that is putting the plaintiffs to a burden beyond what is required by the rules, and certainly whether or not a Bair Hugger was used during that surgery, we think, given the records that were involved, given the sales records that the defendants have, we think would be an issue of fact that should be properly decided by the trier of fact.

I -- I certainly understand that the Court has directed that to the extent that there are some questions about whether or not Bair Hugger was properly documented, that plaintiff should attempt to get additional records. Plaintiffs have produced records on the 100 bellwether candidates randomly selected by the Court. I think that the defendant's point that there was at least one letter that confirmed that Bair Hugger was not used, and to my knowledge that case was dismissed with prejudice by the firm that represented that particular plaintiff, so I think that that's not an issue at least before the Court today.

With respect to other cases where there is, in fact, documents in the medical records, that sometimes the challenges that defendants make seem to be that the -- that the serial number that the plaintiffs have provided does not comport with the serial number that the defendants show as

being placed in that particular hospital. So, for example, Edna Washington, she's 17-CV-3763, the challenges made by 3M about whether or not Bair Hugger was properly used, underneath the entry on the medical record where it says warming device dash Bair Hugger, they actually enter the equipment 81005, but from what we can tell, that's actually likely a number that's assigned by the hospital. It's not necessarily the serial number that was provided by the defendants on their particular product, but it's clear from the records that Bair Hugger was used and that the hospital was even tracking the type of machine that was used during that particular surgery.

We have other examples like that, for Kent Griffin, for example. He's 17-CV-1286. He's challenged by 3M, again, saying that the Bair Hugger system doesn't have the same serial number that they reflected that they have placed at that facility. Now, they agree that they put Bair Huggers in that particular hospital. And the records on page 26 show that a Bair Hugger model 505 was used, and this one, again, provides a serial number, or a number anyways, for the hospital 75853. It looks, to us, that that's an internal hospital tracking number, not the serial number, but certainly there's confirmation that Bair Hugger was used and that the hospital was tracking it. And while 3M certainly agrees that they placed these warming units there

and that they sold the disposable blankets themselves, they are still challenging proof of product in that particular case.

We know from the exchanges that happened in Gareis, the case that we're getting ready to try before Your Honors in May, in December they were able to provide a number of non-Bates-labeled e-mail exchanges between defendants and the hospital at issue there, Providence Hospital, that was essentially a communication about whether or not the hospital was going to continue to use Bair Hugger. I think that we have now ultimately resolved any question the parties had with respect to the use of Bair Hugger in that particular hospital, but we know that there were e-mails that were exchanged between the defendant and the hospital in question and that they hadn't previously been produced, and they related to this issue of product placement.

So while we have outlined a number of different challenges in the actual motion papers we have provided to the Court and we have other examples of additional information that we think are just inappropriate given that we are on the verge of needing to recommend to the Court the list of 16 cases that we think ought to be included in the bellwether repopulation pool, we simply ask to be on an equal footing, because at this point, the defendants are

essentially saying about half of the cases have to be removed from potential consideration based on their proof of product challenges, and we think many of those challenges were not --

THE COURT: As I understand your argument, all they've given you for their challenges are these spreadsheets.

MS. ZIMMERMAN: That's exactly right, Your Honor.

THE COURT: There's no documentation underlying them or backing them up?

MS. ZIMMERMAN: Correct. And to my knowledge, in the interest of full disclosure, they have withdrawn a single challenge to the 53 challenges that they made, but only one. So we what we have are the spreadsheets that they've provided and their objections and that's it at this point. And I'll reserve any additional time.

THE COURT: Okay.

MS. ZIMMERMAN: And I do have a copy of each of the Bair Hugger, the blanket sales, and the warming unit spreadsheet provided by defendants if the Court would like them.

THE COURT: Sure.

MR. GOSS: Does that include all of the backup dates that we've provided or just --

MS. ZIMMERMAN: I think it's just the cover page.

MR. GOSS: Not the full stack with the backup data?

MS. ZIMMERMAN: It does not have each one of the tabs. This is a summary page.

MR. GOSS: Okay. As long as that's clear on the record.

THE COURT: Except now I'm confused again. I thought there was just the spreadsheet. What is the backup stuff that we're talking about?

MS. YOUNG: May I approach too, Your Honor?

THE COURT: I don't want a lot of stuff, but what --

MS. ZIMMERMAN: So there's essentially, if you have Excel spreadsheet, there are different tabs. So this one is a summary sheet of their challenges, and as I understand it, they have a additional tab for each one of the hospitals in the 100 cases where they would say, you know, we show that we shipped, you know --

MS. YOUNG: This is my --

MS. ZIMMERMAN: -- blankets to the hospital on these different occasions. And if an electronic copy would be useful to the Court or to the clerk, I'm happy to e-mail that as well. We have it right here.

THE COURT: All right. Well, I'm still confused, but I will wait to hear from the defendant when we get

there.

MS. ZIMMERMAN: That's right.

THE COURT: Are you done?

MS. ZIMMERMAN: For now, on this. I will wait and address any additional questions the Court may have after defense presents.

THE COURT: All right. Thank you. Ms. Young.

MS. YOUNG: Thank you, Your Honor. So to try to clarify what you have in front of you, so 3M exported from the sales system data for each of the hospitals at issue where the plaintiffs in the 100 cases had their surgeries performed. And the one sheet that I provided for you was just an example of a facility address, and then if you look across, you can see the serial number of the Bair Hugger warming unit, the model type, and the manufacturing ship date, the install date. And so we provided this. We searched and in some cases we had to try to reconcile where an address didn't match a facility name or vice versa, so 3M searched the database, put together this information, and it provides, for each facility at issue, our records with respect to what warming units are placed there.

And then, in addition, we went through for those same facilities and looked at the 12 months prior to the surgery date at issue and provided blanket sale information. So you have the two summary charts, I believe, from

Ms. Zimmerman, but wanted you to be aware that there is backup for each of those.

THE COURT: But the backup is data that you've extracted from a database, not -- and presumably there is -- is there a document that would correspond to, for example, I'm looking at customer No. H0013219, Cartersville Medical Center, are there -- is there a document that this database would generate?

MS. YOUNG: Your Honor, I don't know that. I can confer with Mr. Hulse who might know that, but I do know that this is the exact information. In the prior bellwether selection process the parties did some limited discovery on 31 cases before making our selections in response to those interrogatories served by plaintiffs, and this is identical to the information that we've provided for those 31 cases.

THE COURT: Okay.

MS. YOUNG: Thank you, Your Honor. At issue in plaintiffs' motion is what is sufficient proof of product use to get us over this threshold requirement, and that is what plaintiffs now contend they need additional information from 3M. And, Your Honor, it's our position that this is simply an attempt to shift the burden to 3M in cases where plaintiffs have not come forward with sufficient product use. Pre-trial Order 24 requires the plaintiffs to submit and, as the order says, to confirm use, and so at issue here

is what is sufficient to confirm use.

And as we know from the Skaar case, that's an example where there appeared to be a notation to the Bair Hugger circled on the plaintiffs' medical records and it wasn't until the parties got to Idaho, were taking treating physician depositions, that it became to light that the Bair Hugger was not used in that procedure. And so the Court in open court on December 21st at the status conference, the Court said that that check the box just simply wasn't enough based on the experience that the parties have had in selecting bellwether cases. We also had the Kamke case where it came to light that the Bair Hugger was turned off. And so what we're trying to determine here is what is sufficient proof?

Plaintiffs have pointed out a couple of instances. And our chart on page 3 of our brief sets forward our challenges fall into I think it's six or seven categories, and we tried to do that so that the Court could see what it is, is at issue here. As Ms. Zimmerman pointed out, there was a case that there was actually a letter saying Bair Hugger wasn't used. And when we got the 100 cases, plaintiffs represented to us, they represented to the Court at the next status conference that proof of product use had been provided in every case. That's just simply not the case. There's a number of cases where there's no reference

of warming of any kind, and plaintiffs continue to maintain that it's our records that they need to further evaluate these challenges. So what I think they're really saying, Your Honor, is in those cases where there is a reference to a Bair Hugger, that should be sufficient, the Court should take that at face value and should require us to come forward with additional information.

We believe there is no basis to shift the burden to 3M to provide these unspecified types of documents when what plaintiffs could do and what they should do is go to the facility and provide proof of product use, and they have done that in some cases, even cases where there's references to a Bair Hugger in the documents, some of the plaintiffs firms have gone ahead and gotten that letter from the facility to confirm product use. And it's our position that that is what the Court had envisioned here. The whole purpose of this is to get to cases that can be prepared for bellwether trials so that the parties and the Court aren't expending resources trying to figure out if a case is, in fact, an appropriate bellwether case.

So plaintiffs moved immediately to both strike all of our challenges, which we submit there's no support, that is not an issue that could possibly be before the Court on a motion to compel in this context, nor would there be any basis to strike it. The Court has said we just -- this is

Judge Ericksen, said we can't do this again, we can't be in a position where we don't have proof of product use as the parties move forward through the bellwether process.

So, Your Honor, if you looked at the records that are submitted, if you looked at our charts, there is probably 100 variations in how these come to pass. Again, we've tried to organize them by category, but you have to dig into the records. There are competing references at times. There are what look to be serial numbers that don't match our serial numbers. So in those cases where there's ambiguity, that's where we take issue with plaintiffs' product use. So you may have a reference to a Bair Hugger on a form but then there also, there is nothing else to establish product use. Some have references simply to forced air forming, and as we know, there are other forced air warming manufacturers, and a hospital or facility system might have more than one. So it is plaintiffs burden to come forward with the evidence required to satisfy product use so that we can move forward and select cases.

And Ms. Zimmerman is right, the parties today have to each submit 16 cases to the Court. It's our position if cases have product use challenges that are on those lists, we should come up with a mechanism to address that right up-front should those make it to the list of eight that the Court is going to have move forward to working up.

Defendant's -- or excuse me, plaintiffs' motion also doesn't address what kind of information they purport to be looking for. And I do know Your Honor's question about what additional document might be generated from that list, but I don't believe they're saying that there's any problem with the product placement information that we've provided. What I believe plaintiffs' position is, is that they want us to go search for ESI to try to identify what sales people at 3M may have spoken to salespersons at the facilities at issue and that it's not that they're looking for additional supporting documentation related to the information we've provided. And at best --

THE COURT: Wait a minute. Say that again. I guess my understanding was they were -- my understanding is the plaintiffs' vision of this process is they produce whatever they produce and then it -- the burden shifts to you to show that there was no Bair Hugger used and that what you have produced, these spreadsheets and apparently some backup data, they say is insufficient to establish that. And they give me the example of the misspelled Bair , B-A-E-R, and the internal control numbers that a hospital might use for their devices as opposed to your serial numbers and that those are not -- those two things, for example, don't prove that a Bair Hugger was not used. You're saying that they want discovery about sales people?

MS. YOUNG: Well, Your Honor, I think what there may be a sort of two ships passing in the might in terms of what we're talking about. I think what plaintiffs are -- what we have said with respect to our challenges is that we don't believe the evidence provided is sufficient to prove product use and that it's plaintiffs' burden to do that. So where there's ambiguity in the records, even if there is a Bair Hugger form checked, we heard the Court to be saying that simply is not enough. And so at the December status conference, I think, Your Honor, it relates to the fact, perhaps, that PTO24 is very broad and general and it simply says that the plaintiffs have to confirm use and that defendants may challenge --

THE COURT: Technically it says that plaintiffs must ascertain that a Bair Hugger was used in the surgery at issue to the best of their ability. Have I got that right? I'm reading from PTO No. 24. I think. If plaintiffs have evidence of Bair Hugger use, they must produce it to defendants. Plaintiffs must serve a complete verified plaintiff fact sheet. That's not at issue here, correct? Then paragraph 3 is, by February 16th, defendants must challenge plaintiff as to any disputes about Bair Hugger use in the cases. These challenges must include any relevant documents defendants have. And then by March 12th you need to come up with your 16 cases. Go ahead.

MS. YOUNG: So with respect to the ascertaining use, plaintiffs have represented that they submitted proof of product use in all 100 cases. And it's our view that where they have either cases with no indication of warming at all, cases where they have reference to forced air warming but not the Bair Hugger, and even cases where they have just a form reference to Bair Hugger, that that alone would not be sufficient to meet their threshold requirement of proving product use. And so that's the basis for our challenges. And when we looked at what evidence we have that relates to those challenges, it is the product placement information that we provided, as well as the blanket sales information.

And so the specific cases that I believe plaintiffs highlighted, all of them in their motion, and I'm -- I wouldn't represent this here today, but are the cases that fall into the category if there was a medical records with a checkmark and but the plaintiffs have not provided then any additional information from the facility to show that that was a Bair Hugger unit.

And so, Your Honor, if we want to go through product use challenges, I think that actually would be more on a case-by-case basis. Our issue with this is that that was not sufficient proof in the cases that we challenged based on what we heard the Court to say in the December

status conference and then back in chambers and, again, with the objective in mind that we are simply trying to get to a set of cases where the resources are expended in working up the bellwether case, not trying to figure out if the Bair Hugger was used which is plaintiffs' initial and threshold requirement to filing suit here.

And so I didn't understand plaintiffs to be asking for more documentation related to the charts we've already provided, but we had a very general discussion between our meet and confer. And the motion also doesn't specify what specific information they're seeking that would shed light on what we believe is their burden to establish. And so we ask that the Court deny the motion to strike. We don't think that's a proper issue before the Court, and it certainly doesn't take into account the broad range of proof that we have in all of these cases. And then also that the Court deny the motion to compel because there's no specificity to it and it would be an improper attempt to shift the burden to 3M on an issue that is plaintiffs.

If the parties, if, again, any of these cases make their way into that group of -- final group of eight, I think the parties can address how to deal with any ambiguities that remain on proof of product use.

THE COURT: So how many -- so as I understand it, I'm looking at the chart on page 3 of your memo, there are

53 cases where you challenge the adequacy of the plaintiffs' evidence of Bair Hugger use. Is that a correct statement?

MS. YOUNG: There were, Your Honor, and then after the lexicon waivers came in, that number is now 37. So plaintiff submitted lexicon waivers in 70 cases and did not waive lexicon in 30 cases and then 16 of our challenged cases dropped out. And I know which categories they fall into. They were the majority of those lexicon nonwaiver cases were in the two categories where there was either a reference to forced air warming generally or the Bair Hugger what we call kind of the check the box form document. But there were some cases that fell out of the other categories as well.

THE COURT: So it's the two categories that are both 15 cases? Do we know?

MS. YOUNG: Yes, Your Honor, by my math, nine remain in the forced air warming and ten remain in the check the box Bair Hugger category. And then a couple fell out of the other categories.

THE COURT: And the bottom category of other, there's four cases, what -- is there any --

MS. YOUNG: You know, Your Honor, I'd have to --

THE COURT: One by one because each one is different?

MS. YOUNG: Yeah, they had just different

anomalies to them, and I could go back through my notes and --

THE COURT: Okay.

MS. YOUNG: -- get them. And with respect to the serial numbers, again, there was a reference to a number. It didn't reflect a Bair Hugger serial number, and when we have a number, we can make that -- we can check that.

THE COURT: Right. But that's not really -- I guess how many of that are we talking about?

MS. YOUNG: There are three left in that category.

THE COURT: And that doesn't strike me as being a particularly valid argument. I mean, it's clear there's a Bair Hugger there, there's a number assigned to it, it might not be your number, but the hospital has given it a number, and apparently you don't have records like you do in on your sheets to show that you never sold them a warming unit or you never sold blankets in the year before the surgery. Why are they even on this list?

MS. YOUNG: Well, Your Honor, I think, though, there are records that show ambiguity, and that's what we are trying to have some way of dealing with this. I mean, they moved categorically --

THE COURT: What's ambiguous? What's ambiguity? There's no ambiguity. You don't have records or you do have records showing the sale of a warming unit or the placement

of a warming unit at that hospital. You've showed that in the 12 months before the surgery you sold them blankets. And the fact that they wrote down a number that's different than the number that's on your device, how does that call into question whether a Bair Hugger was used in that surgery if the records the plaintiff has looked at has a check box that says yes, Bair Hugger used?

MS. YOUNG: Well, Your Honor, that would be I believe the exact situation we had in the Scar case where you had the notations, you know, the units are there, but what we have learned through the process is that isn't necessarily sufficient. And we are certainly happy to meet and confer on the very --

THE COURT: Which was the Skaar again? That's the one where they said --

MS. YOUNG: Idaho.

THE COURT: -- turned off?

MS. YOUNG: No that's the one that looked to be a circle on the box and it wasn't until the depositions of the treating physicians in Idaho that I believe it was the CRNA said I don't use this, this -- this wouldn't be how we'd note it. And so we're just trying to figure out where there is ambiguity in the records what will give us sufficient proof, and that would be an affidavit, a verification from the treating physician.

And, again, there are varying levels here of in some of these if you look, Your Honor, and I'd have to look at, again, there's a specific example for each case, some of these show unit placement from the late 90s, from the early 2000s, and maybe those do or don't have blanket sales, but there are tremendous variation in --

THE COURT: Do they still work? Do you have a product that you placed in the 90s and the early 2000s that they're still buying blankets?

MS. YOUNG: Yes, Your Honor.

THE COURT: So what difference does it make, so what if they bought it in 1998 as opposed to 2017?

MS. YOUNG: Well, and, Your Honor, if that is sufficient to move forward, and we can certainly get into discovery and determine like we have done in the other cases whether it was, in fact, there and turned on and used, but we don't believe going back through 3M records to try to figure out any more information about product use is an efficient way. It would be unduly burdensome at this juncture to require that type of discovery when what we're trying to drive here towards are eight cases that can be worked up for trial and that simply we're trying to take the Court's guidance from the last go around and understand what plaintiffs have submitted and whether it's sufficient to resolve ambiguity about use. Our whole objective here is to

figure out if Bair Hugger was used so that we can make those nominations.

THE COURT: Right. And I guess the point is that you're introducing a new phrase, the ambiguity of use. That's not what this is about. This is about Pretrial Order No. 24. Plaintiffs have to come up -- have to ascertain that a Bair Hugger was used. If you say that it wasn't, you've got to produce evidence that shows that it wasn't. Not that there's ambiguity. Your standard isn't whether there's ambiguity. Your standard is it wasn't used. Once they -- they have a prima facie case. They've got to show that it was used. Once they've met their prima facie case, if you want to kick this case out of the bellwether pool, you've got to say and show it wasn't used, not just create some ambiguity that it might not have been used. Am I missing something?

MS. YOUNG: Well, but, Your Honor --

THE COURT: Am I missing something?

MS. YOUNG: Well, I think the issue is have they met their prima facie case, where for example --

THE COURT: I get that. And I understand that's the thing, but that's different than you saying all you've got to do is show some ambiguity about whether it was used because the serial numbers don't match.

MS. YOUNG: Well, Your Honor, I think our

challenges relate to what is required to meet a prima facie case, and what we're doing is going off what we learned in the Skaar case, the Kamke case and what the Court has said about a simple checkmark on a box not being sufficient, and that is where I think the discrepancy or the dispute is here as to what is the prima facie case. And then whether we should be talking about challenges on a case by case basis and what could be done to resolve those disputes I think is a different issue than moving to strike all of our challenges or asking for additional discovery on cases where there's not even a reference to warming at all.

THE COURT: Okay. Do you agree or disagree, Ms. Zimmerman, that the 53 number has now been reduced to 37 by reason of the failure to waive lexicon?

MS. ZIMMERMAN: I will take counsel at her representation on that. I believe that there are, in fact, 30 cases that refused to waive lexicon, so it's still a little over half.

THE COURT: So why don't -- what would be wrong with just simply saying, okay, they challenged these 37, kick them out, let's now from you've got 63 cases left?

MS. ZIMMERMAN: Because we've --

THE COURT: You started with a hundred, right?

MS. ZIMMERMAN: Sure. So we started with a hundred. 30 don't waive lexicon so we're down to 70, and of

that 70, 37 they challenge at this time, so we're down to a little less than half of the remaining 70. You know, I think that we've got some real questions about whether that's appropriate representative.

But kind of getting back to some of the questions that were posed by Your Honor, another way of looking at these spreadsheets is that, you know, if you look at the gray kind of summary spreadsheet 3M prepared, out of the 100 cases randomly selected by the Court, all but four have Bair Hugger heaters placed in those facilities. So and of those four where there are challenges saying we don't see that we ever placed a heater, one is this Carol Griffin case that I mentioned at the beginning where they told -- they told the FDA something different than what they're telling the Court today.

So my question really gets to or the plaintiffs' motion is really intended to drive to, look, if 3M has evidence that nothing was ever sold to this particular facility and it's not a case, there's no fact dispute for a trier of fact to figure out, please tell me and I will get on the phone to whomever the plaintiffs attorney is, as I did last week when I saw this letter that said Bair Hugger wasn't used in this facility, that's one case. That case does not exist and is not pending before this Court anymore. If there is additional evidence about cases like that where

their records show we didn't ever sell anything here, this is not a real case, let's work on that.

But I think that Your Honor's question really drives towards the kind of dispute between the parties, and that is whether or not essentially what needs to happen here is identifying ambiguities and what plaintiffs need to do to respond to that. And I think, unfortunately, while we did learn things in the Scar deposition -- the Skaar, by the way, was a defendant nomination so it was presumably they thought that was a Bair Hugger use as well or they would have either moved to dismiss it or wouldn't have nominated it as a potentially representative bellwether.

THE COURT: Sort of, except their whole point is, as I understand, this is all your burden. You have to establish that a Bair Hugger was used.

MS. ZIMMERMAN: Agreed.

THE COURT: And that checking a box on a form isn't enough. You've got to do something more than that.

MS. ZIMMERMAN: That's their position.

THE COURT: And does that require a affidavit from a doctor or anesthesiologist or something, I don't know, I'm not -- I'm not going say right now, but that's their position, that you've got to do more than just look at a record and see if there's a box checked or a circle around a box.

MS. ZIMMERMAN: Yes, Your Honor. I understand that to be defendant's position. I think that that imposes a burden on the plaintiffs that is not imposed by the Federal Rules of Civil Procedure. The plaintiffs have a good faith when they see that the record is indeed checked. There's certainly people that are going above and beyond that whenever they can to get an affidavit or declaration either from the risk manager or a facilities manager or sometimes the treating physicians, but these cases have been going on, and the treatment, in many instances, are -- is many years ago. Some of the hospitals just don't have the time or the staff or the willingness to submit to legal, you know, form filling out, at this point, and/or the people just aren't there anymore. I mean, the case we're getting ready to try, that surgery was, you know, almost eight years ago now; it was in 2010. So the issue is that going back to figure out what was actually used in the kind of way that I think the defendants are contemplating or hearing the Court to require to resolve any and all ambiguity is really imposing a burden above and beyond the burden that the plaintiffs accept.

THE COURT: But it's the burden that is established by our experience with this case, right? I mean, clearly you've -- you can't sue somebody and hold them liable for something they had nothing to do with. So if it

was an ABC machine that was used, not a Bair Hugger.

MS. ZIMMERMAN: Absolutely.

THE COURT: 3M is not responsible for that.

MS. ZIMMERMAN: Absolutely.

THE COURT: And you can't sue them for it and you can't haul them into court and make them go to trial.

MS. ZIMMERMAN: Absolutely, Your Honor. Plaintiffs agree. But I think that the issue, though, is that the way that the proof of product issue has been painted in this court is different than what we believe the facts really reflect of the six bellwether nominations that we started to work up. There was only one where there was a real proof of product issue and that was the Scar case that nobody knew until we got to a deposition. So and given the timeframe that's outlined in Pre-trial Order 24, we can't -- we don't believe that the Court assumed that the parties were going to go depose every one of the treating facilities to figure out and resolve any and all ambiguity. That just wouldn't have been feasible.

THE COURT: No, but I do think what the Court anticipated that the plaintiffs' lawyers, and it's the whole panoply of lawyers, not just and your committee but whoever has got these cases, was going to do more than just look at the record that you already got and see if there's a checkbox, that you're going to do something to ascertain

that a Bair Hugger was actually used. Maybe it's just a call to the hospital. Maybe it's looking at more records than what's in your possession at the moment. I don't know what it would be. But I think the Court anticipated it would be more than what you did for the first go round because the first go round resulted in one bellwether that actually can go to trial.

MS. ZIMMERMAN: So, Your Honor, I think that from the plaintiffs' perspective, Pretrial Order No. 24 outlines what we're required to do, and what we heard the Court to say was that plaintiffs had to say, are you -- are we prepared to try this case? It -- do we have evidence that confirms Bair Hugger use such that I will walk into this courtroom and say, you know, Judge Noel and Judge Ericksen, may I please the Court, I'm here to present my trial, my case for trial.

THE COURT: Let me just make sure you're clear. I'm not going to be there for the trial. That's Judge Ericksen's problem. But go ahead. I appreciate the --

MS. ZIMMERMAN: So we heard the Court to instruct that what the plaintiffs were required to do was get evidence such that we felt confident that we were going to be able to come in here and say to a court and to a jury, we believe that the Bair Hugger was used in Mr. Anderson's case, for example, and records we think support that, and to

the extent that defendants then think that we're wrong about that, that is part of what happens in a adversarial process.

There is a mutual discovery obligation in these, and when we come forward and we say, okay, Mr. Anderson, head of surgery at this particular place, or, for example, Ms. Griffin, you say that couldn't be possible, well, we say that, you know, your records suggest otherwise and we say that Ms. Griffin's medical records, she was exposed to this and we know you were selling blankets.

So we think that there is, you know, to the extent that there is ambiguity or a lack of meeting of the minds as to what was sold when and who was exposed to it, we think that it's inappropriate for the defendants to use this process of challenging proof of product to unfairly filter the potential bellwether pool. And we certainly see examples that they have more information about what was placed where, and we think that some of these challenges were not made in good faith.

THE COURT: So let me make sure I'm following because I'm still a little confused about what that there is and what there isn't. So you've given me these spreadsheets.

MS. ZIMMERMAN: Mm-hmm. Yes.

THE COURT: And then the defendant says, but, wait, you also got to have the backup and the backup they

say this is the documentation that's the subject of your motion to compel, as I understand it, this is their database, whatever it is, that shows when they placed a warming unit at a given hospital and how -- whether they sold blankets in the 12 months before the surgery.

MS. ZIMMERMAN: Yes.

THE COURT: Is it your contention that there's more than that that you want or that they just haven't given you this for all of the items on the -- that they challenge?

MS. ZIMMERMAN: We think that we have -- we think that we have a summary spreadsheet, so it's an Excel spreadsheet. The documents I printed for Your Honor, there are tabs on the bottom, if you're familiar with Excel where you can flip from one tab to the next, so they have a summary sheet which is in front of you presently and then there are tabs for each of the different hospital, at least for the warming unit. The heater, that is not printed because it would be a voluminous production per hospital. And the vast majority of those comport with the kind of all gray spreadsheet that I've showed to Your Honor where all but four of the 100 hospitals are shown to be Bair Hugger warming unit customers.

So I think that at least with respect to, I mean, if we can assume that 94 -- 96, I'm sorry, 96 of the hundred we know have heaters, then we can look at the blue and white

sheet that's in front of you and that talks about whether or not blankets were placed in the facility in the 12 months prior to the plaintiffs' surgery. I think that Your Honor's question was to opposing counsel was really kind of getting at the issue which is if there is a case where defendants are sure based on their own internal information that, you know, maybe it's Carol Griffin, that we didn't sell anything, I mean, they show blankets but they don't show a heater, they don't show blanket sales, they don't show any of that, then if they can tell us that, we can try and figure out where the kind of -- where we're missing each other. But what we're seeing in these challenges instead are, well, your serial numbers don't match our serial numbers so that can't be part of the pool. And that's imposing a burden on the plaintiffs and, frankly, excluding a number of cases that ought to be considered as potentially representative bellwether nominations simply because they've created an ambiguity in the record about proof of use.

THE COURT: Okay. Thank you.

MR. HULSE: Your Honor, Ben Hulse for --

THE COURT: Who are you? I don't believe you entered an appearance .

MR. HULSE: I was just going to say, I do defer to Ms. Young. As the discovery guy and the person --

THE COURT: Just for the record, this is Mr. Hulse

speaking. Go ahead.

MR. HULSE: Good morning, everybody. Ben Hulse for defense. I can speak to the data, where it comes from, what was provided to plaintiffs, if it would be helpful to --

THE COURT: Well, that was my last question I was going to ask Ms. Young, but if you want to answer it, I suppose that would be fine. So this?

MR. HULSE: Yes.

THE COURT: And the court record should reflect I'm holding up a single sheet which was given to me as an example by Ms. Young of a backup piece, correct?

MR. HULSE: Yes, Your Honor.

THE COURT: Okay. Is this a printout from a database kept in the ordinary course of business by 3M or is this something that was created along with the databases that what Ms. Zimmerman handed me as an attachment by that some human was looking at information and then entered the data anew into an Excel spreadsheet?

MR. HULSE: The item that you're holding right now, Your Honor, is generated in the ordinary course of business from 3M's sales systems. Basically the way it comes to be is that there is a paper invoice. It is in a box somewhere in the bowels of 3M. That was all keyed in at the time of the sale or the placement into 3M's system or

Arizant's predecessor system. A report is then generated which provides the information in the system about the placement of the unit.

We also for simply explanatory purposes and for a quicker reference created these additional cover sheets that summarize all of the underlying data that we provide. For example, sometimes we had cases where the -- we did not show blanket sales to a hospital or facility at the particular address that had been provided to us at the plaintiffs but we had a -- blankets provided to a facility at a very similar address and a facility with a similar name, and we've provided that data. So that's the kind of thing that's notated on these cover sheets that we prepared. But there were close to, it wasn't 200 because we didn't show sales and placement to all hospitals because we didn't have any, but there's still somewhere around 185, 190 individual spreadsheets that were provided to plaintiffs, individual spreadsheets for both the blanket sales and for the warming unit placement generated from 3M systems in their ordinary course of business, business data.

THE COURT: Is Ms. Zimmerman correct that for 96 of the 100 there was warming units placed?

MR. HULSE: I think that is correct. At some point in time there was, for 96 facilities, and again, this also includes ones where we didn't have a perfect match but

we saw something that looked like a facility with a similar address and we provided warming unit information for all of those.

So maybe just to sort of clarify one point, our challenges are overwhelmingly based on the medical records that have been produced. We provided the warming unit and sales information because it's -- it is, we concede, relevant to all of this. And we would agree that if there is a warming unit placed at the facility, it makes it more likely that the Bair Hugger was used. If there were blanket sales for the 12 months prior, it makes it more likely. But as we know from our first round of bellwethers, it's still not ultimately determinative. It's only --

THE COURT: Well, let's put aside which is which. This one the -- the -- the spreadsheet that's all white and gray is the placement of warming units?

MS. ZIMMERMAN: That's the warming unit. You can see it.

MR. HULSE: Yeah, actually, it's hard for me to see from there, Your Honor, but it sounds like it's the warming unit.

MS. ZIMMERMAN: And when you say this one --

THE COURT: So I'm going to assume that 96 out of 100 is good enough for warming units.

MR. HULSE: For warming unit. But, again, all

this means is that we show that a warming unit was placed. It doesn't mean that warming unit was still in use at the time of the --

THE COURT: I understand all of that. And then so the only, what I'm -- it appears to me the only evidence that really relates to this issue of whether a case should be in the bellwether because a Bair Hugger was or wasn't used is the one showing when you sold them -- last sold them blankets?

MR. HULSE: I think that -- that's probably more helpful evidence.

THE COURT: And it's the defendant's contention that in now 37 out of the 100 cases -- or 37 out of the 70 --

MS. YOUNG: 53. It was 37 out of the 53 challenges.

THE COURT: Okay. 37 out of the 53 challenges, but still, it's -- there's now 37 challenges.

MS. YOUNG: Correct.

THE COURT: Out of the -- when you take the lexicon waivers out of the 100, you're down to.

MS. YOUNG: 70, yes.

THE COURT: 70. So 57 -- or 37 out of the 70 are now being challenged. By the way, is there anything in this spreadsheet that will tell me who hasn't waived lexicon?

MR. HULSE: No, Your Honor. Unless that's something that either side has created.

MS. ZIMMERMAN: I have a spreadsheet with that. I could certainly provide it to the Court, but --

MR. HULSE: If that's useful information, I'm sure the parties could collaborate on it and provide it.

THE COURT: Yes, let's do that. So before the day is out, get together and submit to me a revised page 3 of your memo so that will show which of the 53 are no longer being challenged, so it shows the 37 that are being challenged, and then a revised, this includes all 100 cases, and then it's either you've produced stuff and everybody agrees or you haven't. And have I got that right?

MR. HULSE: If we didn't produce, it's because we couldn't find a matching or a similar address so we reached the conclusion that they weren't a customer. And we searched both for similar facility names and similar addresses, recognizing that in the healthcare world, the hospitals change names all the time.

THE COURT: Okay. I guess my question is, are there a hundred things listed on this spreadsheet?

MS. ZIMMERMAN: Yes.

THE COURT: Okay. And so if it's just an X in the box in the column called disposable sales found for 12 months before surgery, that means yes?

MR. HULSE: Yes.

THE COURT: Okay. So then just somebody tell me which of these 100 are out for lexicon reasons as opposed to Bair Hugger use reasons.

What about, Ms. Young, the argument that FDA was told one thing and the response on this spreadsheet is another with regard to blanket sales on one of the hospitals?

MS. YOUNG: You know, we didn't have any information about that before today. I will have to check into it and get back to the Court.

THE COURT: Okay.

MS. YOUNG: I wasn't aware of that. But, Your Honor, I think this is obviously coming to a head today because the parties 16 nominations are due. 3M is certainly willing to allow cases to be nominated with a notation as to where there's product use challenges and then to move forward with whatever seems to be the best way to address those, and the parties -- the Court then is going to pick 12 and each party is going to strike two.

I'm wondering if we may be able to just agree that parties can list cases and then note the nature of the product use challenge. I think the Court certainly has an understanding now of the different categories that we've challenged. I would suggest perhaps that we could do it in

that manner and then this issue may actually not come to a head in any way that applies across all of the 70 cases. So I think we could likely resolve this.

THE COURT: So I can kick the can down the road.

MS. YOUNG: Pardon me?

THE COURT: That I can kick the can down the road.

MS. YOUNG: Yes, since by probably 5 o'clock today we're submitting our lists, and that would be the approach that we would think makes sense.

THE COURT: Ms. Zimmerman, any thoughts on that?

MS. ZIMMERMAN: Well, we're happy to work with defense counsel on that. I mean, I'm a little worried that the defendant's nominations of 16 are going to be from just this, what's left, 37.

MS. YOUNG: They are not. They are not, Your Honor. They would not be.

MS. ZIMMERMAN: Then we should just submit our lists to the Court and not bother him with additional --

MS. YOUNG: There will be some, obviously, because of, as Ms. Zimmerman has said, we whittle, whittle, whittle and we're left with -- we -- we will have some likely that have product use challenges, we would identify those for the Court. We certainly aren't making an effort -- we want to get through this process and have cases that can be worked up. That's -- that is our objection in all of this. Our

objective.

THE COURT: Objective.

MS. YOUNG: Excuse me. Slip there.

THE COURT: Okay.

MS. ZIMMERMAN: And we'll be back before Your Honor again on Thursday, I think, for the status conference.

THE COURT: Right.

MS. ZIMMERMAN: And I certainly, if it's something we can work out, that's fantastic and I'd prefer not to bother the Court with it. What we were worried about was that these nominations, A, that we might be limited, and, B, that defendants wouldn't be -- would be nominating a case they thought didn't have Bair Hugger proof because that doesn't seem to be appropriate.

THE COURT: Okay.

MS. ZIMMERMAN: Perhaps we can get past that.

THE COURT: So let's, as I understand it, keep doing what I suggested so I got a full thing as to and have this lexicon, because that seems, to me, to be as at least as big an issue or bigger than this issue; in other words, that you've now whittled the 100 down to 70 because 30 folks want to try their cases at home, so get me that information. And in the meantime go forth and select your cases without regard to the product placement challenges, and we'll deal with those, and it may be that nobody picks a case that has

a challenge. But we can deal with it. We'll have a fewer number that we need to know that do need to be dealt with.

MS. YOUNG: Thank you, Your Honor.

THE COURT: Okay. All right. So then the next thing is the defendant's motion for a protective order Mr. Goss, is that you?

MR. GOSS: Yes, thank you, Your Honor.

THE COURT: Okay.

MR. GOSS: So the defendants are moving for a protective order for a subpoena that was served on Dr. Walter Minkowycz. And Dr. Minkowycz is a professor of mechanical engineering at the University of Illinois-Chicago and he's also the editor in chief of a journal called the *Journal of Numerical Heat Transfer*. Defendants computational fluid dynamics expert, Dr. John Abraham, published an article in the *Journal of Numerical Heat Transfer* back in August. And the subpoena appears to be directed towards Dr. Minkowycz to get discovery into the pre-publication processing of the article before it was selected for publication. The subpoena was served on February 15th.

During -- actually during Dr. Abraham's deposition specific to the Gareis case, he was questioned about the publication, about the article , and he actually produced an acceptance letter which is Exhibit 5 to Ms. Zimmerman's

affidavit in support of her opposition. And the letter says, from Dr. Minkowycz to Dr. Abraham, it says, I have reviewed the paper carefully and find it to be of good quality. Indeed, the quality standard of the paper merits acceptance for publication without further review. And Dr. Abraham was asked, did you ever get any comments from any outside reviewers? And he said no, I didn't. As far as I know, the paper was reviewed by Dr. Minkowycz only, and he didn't have any information about whether Dr. Minkowycz had sent the paper to outside reviewers.

Plaintiffs have said in their papers that and they confronted Dr. Abraham at his deposition with the idea that, look, this doesn't comply with the written procedures for Taylor and Francis which is the publisher for many scientific journals, including this one, and Dr. Abraham's answer to that was that the editor in chief has the prerogative to publish things without sending them out for review.

So this subpoena was served, again, on February 15th. Expert general cause discovery closed last August. And, in fact, I think when plaintiffs moved for leave to seek additional discovery from Dr. Augustine, plaintiffs' counsel mentioned that they were interested in perhaps pursuing some additional discovery surrounding Dr. Abraham's article. So it's not a new issue. The Gareis

case specific discovery closed in December. So our position is that this subpoena was served out of time and that plaintiffs ought to have first moved for leave to seek --

THE COURT: Is it clear or is it my understanding, then, that what you're telling me the state of the record is that this article was described as being peer-reviewed when it wasn't?

MR. GOSS: I think that's plaintiffs' position, although --

THE COURT: What's your position?

MR. GOSS: Well, our position is that it was reviewed by the editor in chief. So in that sense, it was peer reviewed.

THE COURT: Okay. But everybody agrees -- I guess that's the question.

MR. GOSS: Right.

THE COURT: All of it is spin or interpretation. You're -- but it -- everybody agrees the facts are it was submitted for publication, the editor in chief reviewed it, the editor in chief accepted it, and there were no other comments from other people skilled in the art?

MR. GOSS: That's right, Your Honor. That's absolutely right.

THE COURT: There's no dispute about any of those facts ?

MR. GOSS: There's no evidence in the record that it was ever sent out for review or any reviewers provided Dr. Abraham any comments, which raises the question, why do we need to go to Chicago two months before trial and take the deposition of Dr. Minkowycz when plaintiffs already have in the record what they need to impeach Dr. Abraham if he says on the stand, well, yes, this was peer reviewed? Plaintiffs have said that there are 3M marketing materials that describe the article as peer reviewed. They didn't identify the -- I'm not saying that these statements haven't been made. They didn't identify them. And I would submit that there's no -- none of the witnesses at trial are going to say that relied on a 3M statements about peer reviewed status about Dr. Abraham's article. And Dr. Abraham himself is going to rely on his report which is substantially the same as the article.

So the question is why do we need this discovery, and our position is that it's not only late, it's just not needed. They have what they need to impeach Dr. Abraham on this issue. Dr. Minkowycz is 81 years old and probably wondering what all of this is about. And I -- defendants just don't see the need to bother him, you know, in this short window before trial. But if we're going to reopen discovery to discuss issues surrounding publications, plaintiffs have refused to provide the same type of

information on Dr. Elghobashi's article which wasn't published until after the Gareis discovery period closed. We're concerned, I asked Dr. Elghobashi about the conflict of interest disclosure in his article which says the authors have no conflicts to disclose. In his view, there was no conflict. Our position is that, well, if we're going to reopen discovery, we would like to know from the journal whether they would consider funding from plaintiffs' counsel to be a potential conflict given the litigation. So we think all of this is too late, but if we're going to reopen discovery, then defendants will likewise move for leave to pursue discovery on Dr. Elghobashi's article.

THE COURT: Okay. Ms. Zimmerman.

MS. ZIMMERMAN: Yes, thank you, Your Honor. I think that Your Honor has understood the salient facts at issue here.

THE COURT: So I guess then my ultimate question is, why do we need to go to Chicago to depose this guy? Everybody agrees there -- nobody else reviewed this article but the editor in chief, period, end of sentence. Why do we need to -- - what more do you need? The record is clear, that's what you want it to show, right?

MS. ZIMMERMAN: Your Honor, I think that's correct . We did need to know because during his deposition, Dr. Abraham testified under oath that this was a peer

reviewed publication. And once he testified that, given the documents that he produced to us, we had some questions about whether or not he was telling us the truth. That's the reason that the subpoena wasn't timely prior to that. It wasn't until he averred under oath that this was peer reviewed that we served the subpoena. We do have additional information now that -- that, I mean, from counsel even on the record today saying, yeah, this wasn't peer reviewed because Dr. Abraham didn't go quite that far.

THE COURT: Just to be clear, he didn't say it wasn't peer reviewed; he said editor in chief alone constitutes peer review and therefore it's peer reviewed.

MS. ZIMMERMAN: That's correct.

THE COURT: Go ahead.

MS. ZIMMERMAN: And the papers that we submitted along with our motion, as I can tell Your Honor read, detailed what the peer-reviewed process ought to be in this particular journal. Dr. Minkowycz is, in fact, an 81-year-old former frequent colleague of Dr. Abraham's and Dr. Sparrow's, both of whom have published a number of different articles together, some of which relate to issues here. We're not sure yet which articles different experts are intending to rely upon when we get to trial and so we want to get to the heart of what really was done here and whether or not this was an appropriately submitted and

peer-reviewed publication.

Now, plaintiffs submitted subpoena to Dr. Abraham that mirrored really the subpoenas defendants served on our experts last spring in the general causation phase. It would have contemplated production of these documents back then, but these were not produced to us in advance of his deposition in July. We did finally get them this February just before his deposition, and that's where we said oh, something doesn't seem quite right here, and that's the reason that we asked the questions and we served the subpoena.

We do think that there's a departure from the peer-reviewed standards in the journal, and we do think that that will be appropriate cross-examination. But we think that we need more information about exactly what happened here and what's been represented, because this paper is not disclaimed by the journal, it is not being subjected to the peer-review process that they typically hold themselves to. And the person who is going to have the information about that are essentially twofold, Dr. Abraham, the corresponding author, and Dr. Minkowycz, the editor in chief who decided on his own to publish this article.

Now, I can tell the Court Dr. Minkowycz called me because he received the subpoena. He told me on the phone that he doesn't have a lawyer on this, that he doesn't know

anything about this particular subject area, and he doesn't want to be involved. I think that we need that information under oath so that we can really properly investigate whether or not this article ought to have been published and what impact it has on the litigation here and on the opinions that I don't know if the FDA was provided copies of Dr. Abraham's published work. Counsel has represented here that both the published work and the report disclosed in this litigation are, you know, substantially similar, if not nearly identical. So these things really do get to the heart of what Dr. Abraham intends to testify about in this Court before a jury, whether it's upstairs or where, about matters that are really going to the key of this particular case.

Now, I feel obligated to respond briefly that counsel has noted Dr. Elghobashi did not disclose that the plaintiffs had provided funding for the research that his group did. What was not cited to the Court is the section of his deposition where he was asked, why did you think that it might not be a conflict? And Dr. Elghobashi said, I told the plaintiffs at the beginning when they commissioned me to do this work I was going to publish it no matter what the results showed. And that's why, under his under oath testimony, he felt it wasn't a conflict because he was going to publish it whether it supported the plaintiffs or not.

And we can provide that deposition testimony if the Court would like it.

So we think that the information that Dr. Minkowycz has is relevant to a key witness that the defendants intend to call. And the Court is certainly aware of how important the CFD experts have been throughout the heart of this litigation, and we ought to be entitled to discover that information.

I will also say, it is my expectation that there are going to be lawyers that look for this. There's a state court litigation that's pending in Illinois right now, and the lawyers that have not been particularly active thus far are quite interested in these kinds of issues. So I think that Dr. Minkowycz, whether in the Gareis case or in a different case, is going to be providing discovery with respect to these issues. So we would like to go forward with the discovery because we think it's important for Gareis and for other matters, and we appreciate the Court's attention.

THE COURT: Okay. Anything else, Mr. Goss?

MR. GOSS: I would just say, Your Honor, Dr. Abraham tends to rely on his report, which he was cross-examined quite extensively about the peer review and publication, is not really --

THE COURT: Is Dr. Abraham going to be testifying

at trial or his --

MR. GOSS: That's --

THE COURT: -- deposition going to be offered?

MR. GOSS: Well, if Dr. Elghobashi doesn't testify, then maybe not, but if Dr. Elghobashi will be present, then Dr. Abraham as a rebuttal witness will be testifying in response.

THE COURT: Is Dr. Elghobashi going to be --

MS. ZIMMERMAN: Dr. Elghobashi will certainly be here live.

THE COURT: Okay. Give me two seconds.

All right. So with regard to both of these motions, here's what's going to happen. First, as I understand it, the parties have agreed with respect to the recalculation of the bellwether pool that irrespective of challenges to the product placement or product use issue, all of those cases are available to both sides to designate as potential bellwethers, and if in fact, at the end of your respective nominations cases remain which are subject to product use challenges, the Court will address that at that time.

With regard to this motion for a protective order, as I understand it, the motion is for an order essentially quashing the deposition subpoena for Dr. Minkowycz. And that motion will be granted, and the basis for it is the

Court concludes that the time for the discovery has closed, and the state of the record is clear regarding the facts, although apparently the parties disagree about the meaning of peer review. The facts are clear the article was published at the direction of the editor in chief without further review or comment by others in the field or others skilled in the art of the field, and the field we're talking about is computational fluid dynamics.

MR. GOSS: Yes, Your Honor.

THE COURT: I just had to say that out loud because I've been working on the expression.

So anything else with regard to either of these motions, Ms. Zimmerman?

MS. ZIMMERMAN: No, Your Honor.

THE COURT: Ms. Young.

MS. YOUNG: No, Your Honor. Thank you.

THE COURT: Mr. Goss.

MR. GOSS: No, Your Honor.

THE COURT: Mr. Hulse.

MR. HULSE: No, Your Honor. Any -- anything that's on the Court's mind for Thursday that we should be prepared to address?

THE COURT: I am chatting with both Patrick who is here and Chad when we're done here, so the answer is not right now.

MS. YOUNG: Okay. Then we'll be submitting a agenda.

THE COURT: And just so the record is clear, just to round things out, Ms. Ahmann, do you have anything?

MS. AHMANN: I have nothing further, Your Honor. Thank you.

THE COURT: Thank you for being here. And we are in recess.

MS. ZIMMERMAN: Thank you, Your Honor.

THE COURT: And we'll see you on Thursday but we're going to be up in Judge Ericksen's courtroom even though she's not here.

(Court adjourned.)

* * *

I, Staci A. Heichert, certify that the foregoing is a correct transcript to the best of my ability from the digital recording in the above-entitled matter.

Certified by: *s/ Staci A. Heichert*

Staci A. Heichert,
RDR, CRR, CRC